

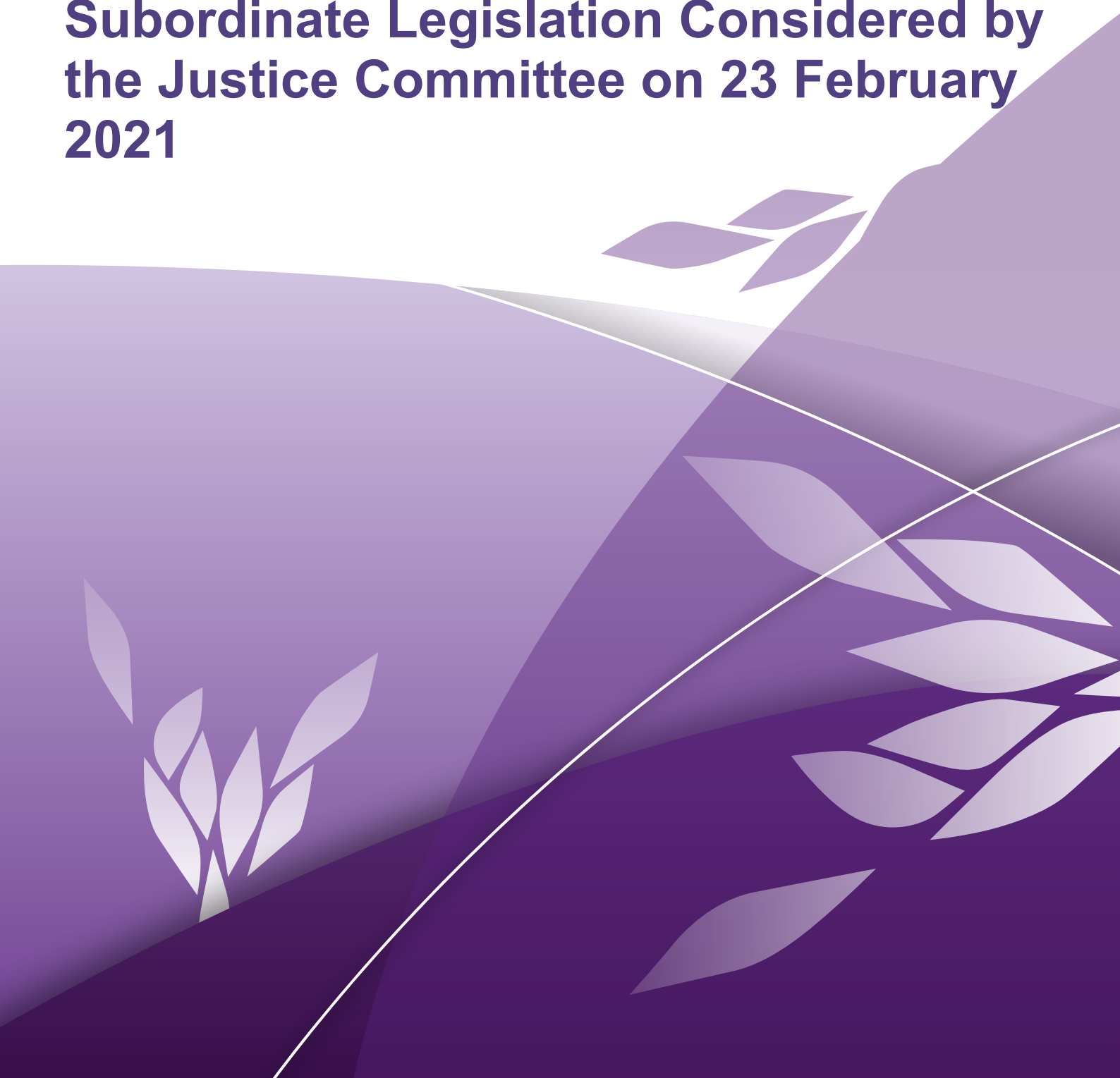


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## **Justice Committee Comataidh a' Cheartais**

# **Subordinate Legislation Considered by the Justice Committee on 23 February 2021**



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# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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# Introduction

1. At its meeting on 23 February 2021, the Justice Committee considered the following instruments:
  - [The Criminal Justice \(Scotland\) Act 2003 \(Supplemental Provisions\) Order 2021 \[draft\]](#)
  - [The Community Orders \(Coronavirus\) \(Scotland\) Regulations 2021 \[draft\]](#)
2. The instruments are subject to the affirmative procedure.

# The Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft]

3. The Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] was laid before the Scottish Parliament on 26 January 2021 and referred to the Justice Committee.
4. The Order is made in exercise of the powers conferred by section 84(1) of the Criminal Justice (Scotland) Act 2003(a).
5. It will allow the three powers relating to victim statements contained in Section 14 of the 2003 Act: the power to prescribe courts; the power to prescribe offences; and the power to prescribe the form and manner of victim statements, to be used flexibly to make different provisions for different purposes.
6. This will enable the Scottish Ministers to use the powers in section 14 to pilot changes to the current victim statement scheme to provide more victims with the opportunity to make a victim statement. It will also enable the Scottish Ministers to explore different ways for victim statements to be made (e.g. recorded) and thereafter bring more permanent changes into force following any pilot scheme introduced under these powers.

# The Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft]

7. The Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] were laid before the Scottish Parliament on 29 January 2021 and referred to the Justice Committee.
8. The Regulations are made in exercise of the powers conferred by paragraph 15(1), Schedule 4, Part 6, of the Coronavirus (Scotland) Act 2020.
9. The Regulations vary all unpaid work (UPW) or other activity requirements in Community Payback Orders (CPOs), reducing the number of hours imposed in each order by 35%. These regulations apply to all CPOs imposed prior to the regulations coming into force with an unpaid work or other activity requirement where hours are outstanding. The only exceptions are those CPOs imposed either entirely or partially for domestic abuse, sexual offences or stalking.
10. The regulations are intended to reduce the pressure faced by justice social work (JSW) services within local authorities, increasing available capacity to help ensure that existing orders can be completed within timescales expected by courts and any new orders that are imposed can commence promptly.



# Consideration by the Delegated Powers and Law Reform Committee

11. The Delegated Powers and Law Reform Committee (the 'DPLR Committee') considered both of the instruments at its meeting on 16 February 2021.
12. The DPLR Committee agreed to draw the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] to the attention of the Parliament on reporting ground (g) as it has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute.
13. The DPLR Committee also agreed to draw the Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] to the attention of the Parliament on the general reporting ground on the basis that there are drafting errors in regulation 4 of the instrument. The Committee noted the Scottish Government's commitment to amend these errors by way of a correction slip.
14. The relevant extracts from the [Delegated Powers and Law Reform Committee's report](#) can be found in the **Annex** .

## Consideration by the Justice Committee

15. Motions S5M-23986 and S5M-240333 were lodged proposing that the Committee recommends approval of the instruments. The Committee took oral evidence from Cabinet Secretary for Justice ("the Cabinet Secretary"), Humza Yousaf MSP at its meeting on 23 February 2021.
16. The Cabinet Secretary outlined the purpose of the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] to the Committee, as set out previously.
17. In response to questions from Members as to why the delegated powers were being used in this way, the Cabinet Secretary advised that the process provided the most expedient way to proceed. He stated that it was important that the DPLR Committee said there was no suggestion that the instrument is outwith vires and the process provided the only way to achieve the desired outcome without having to introduce primary legislation.
18. There being no further questions from Members, the Cabinet Secretary moved the motion in his name:  
  
S5M-23986—That the Justice Committee recommends that the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] be approved.
19. Motion S5M-23986 was agreed to without debate or dissent.
20. The Cabinet Secretary went on to set out the purpose of the Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] .
21. In response to questions from Members, the Cabinet Secretary advised that the unpaid work element of community orders will be reduced by 35 percent but the majority of the hours that are imposed will still have to be completed. The situation has been created as a result of the effects and challenges of the global pandemic which meant resources at local authority level had to be diverted away from criminal justice social work and put into other departments in order to respond.
22. The Cabinet Secretary stated that the concern was that if systems were overwhelmed then sheriffs would have no alternative but to give custodial sentences when prisons are already full. Interventions that are in place in a community order to address somebody's offending behaviour, for example for substance abuse issues, will not be affected by the reduction in unpaid work hours.
23. The Cabinet Secretary gave reassurance that there is a legal basis for the policy. Under Article 14 of ECHR there can be objective justification for treating various people and categories differently and certain offences were being excluded because of the unique dynamic involved. The Cabinet Secretary advised that the issue will be kept under review and that £50 million had been allocated in the recovery, renewal and transformation project. While the focus of the fund will be on the backlog of court cases the Cabinet Secretary confirmed that it will also be used to bolster the community justice arm of the justice system.
24. Following the evidence session, the Cabinet Secretary moved the motion in his

name:

- S5M-24033—That the Justice Committee recommends that the Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] be approved.

25. After debate, the motion was agreed to (by division: For 7, Against 2, Abstentions 0).

The Justice Committee recommends to the Scottish Parliament that it approve the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] and the Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] .

# Annex

## EXTRACT FROM THE DPLR COMMITTEE'S REPORT ON THE INSTRUMENTS

### **Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 (SSI 2021/ draft)**

Section 14 of the Criminal Justice (Scotland) Act 2003 confers regulation-making powers on the Scottish Ministers to prescribe the courts in which victim statements can be made (section 14(1)), the offences in respect of which statements can be made (section 14(2)), and the form and manner in which victim statements may be made (section 14(13)).

Section 23(7) of the Victims and Witnesses (Scotland) Act 2014, which inserts section 14(13) to (16) into the 2003 Act, was commenced on 10 February 2021 (by SSI 2020/405). New subsections (14) to (16) of section 14 of the 2003 Act allow the delegated power in section 14(13) to include ancillary provision, to modify an enactment (including the 2003 Act), and to have effect in specified areas for a specified period of time.

This instrument uses the delegated power in section 84(1) of the 2003 Act to make supplemental provision by substituting section 14(15) and (16) of the 2003 Act as amended by the 2014 Act. The instrument allows Scottish Ministers to combine exercise of the delegated powers in section 14(1), (2) and (13) to make different provision for different purposes. The Policy Note accompanying the instrument indicates that the intention is to allow the existing delegated powers to be used more flexibly to allow victim statements to be piloted in relation to specific offences being tried in a specific court and in a prescribed manner.

The Committee is content that the instrument appears to be within vires (i.e. that the Scottish Government has the power to make this instrument). Nevertheless, it has been made by what appears to be an unusual or unexpected use of the power conferred on Scottish Ministers to make supplemental provision in section 84(1) of the 2003 Act, by expanding the scope of the powers delegated to Scottish Ministers in section 14(1), (2) and (13) of that Act (as amended by the 2014 Act). This approach may be something the lead committee wishes to raise with the relevant minister when taking evidence on the instrument.

**The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (g) as it has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute.**

### **Community Orders (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/draft)**

The purpose of this instrument is to reduce the overall number of hours that an offender is required to work (or spend doing another specified activity) under certain Community Payback Orders by 35%.

Drafting errors have been identified in regulation 4(1)(b) and (c) of the instrument. In both instances, the reference to “relevant unpaid work or other requirement” should be to “relevant unpaid work or other activity requirement” as defined in regulation 1.

**The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground on the basis that there are drafting errors in regulation**

**4 of the instrument.**

**The Committee notes the Scottish Government's commitment to amend these errors by way of a correction slip.**

